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and designated Nevada counsel for Estate of Tabas

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re:

USA COMMERCIAL MORTGAGE COMPANY,  
Debtor.

USA CAPITAL REALTY ADVISORS, LLC,  
Debtor.

USA CAPITAL DIVERSIFIED TRUST DEED FUND,  
LLC,  
Debtor.

USA CAPITAL FIRST TRUST DEED FUND, LLC,  
Debtor.

USA SECURITIES, LLC,  
Debtor.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR  
Case No. BK-S-06-10729-LBR

Chapter 11

**REPLY OF ESTATE OF DANIEL  
TABAS AND FERTITTA  
ENTERPRISES, INC., TO  
DEBTORS' OPPOSITION TO  
MOTION FOR RELIEF FROM  
THE AUTOMATIC STAY TO  
TERMINATE THE LOAN  
SERVICING AGREEMENT FOR  
THE DIRECT LOAN TO COLT  
GATEWAY LLC**

Hearing Date: February 15, 2007  
Hearing Time: 9:30 am

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1 The Estate of Daniel Tabas ("Tabas") and Fertitta Enterprises, Inc. ("Fertitta") reply to the  
 2 opposition filed by Debtors USA Commercial Mortgage Company and USA Capital Diversified  
 3 Trust Deed Fund, LLC ("Debtors") (Ct. Dkt. #2696-97, Opposition & T. Allison decl., filed Feb.  
 4 5, 2007) and joined by the Official Committee of Unsecured Creditors for USA Commercial  
 5 Mortgage Company (Ct. Dkt. #2706, filed Feb. 7, 2007).<sup>1</sup>

## 6 MEMORANDUM OF POINTS AND AUTHORITIES

7 As an initial point, Tabas and Fertitta emphasize that they hold a majority interest in the  
 8 Colt Gateway loan, in terms of interest and the number of lenders. Debtors argue that Diversified  
 9 Trust has a "substantial" interest in the loan, but they omit the fact that it has a minority interest in  
 10 the loan. Tabas and Fertitta, as the majority lenders, are entitled to make changes in the servicing  
 11 agent under the terms of the Tabas servicing agreement and Nevada state law.

### 12 A. Tabas and Fertitta timely filed their motion.

13 Debtors assert that the motion is not timely because it was filed at a critical time on the eve  
 14 of the plan effective date. Debtors have no basis for this representation. Whether movants are  
 15 allowed to change the servicing rights on this loan has no bearing on the plan effective date.  
 16 Debtors make reference to the closing date with Compass, a condition precedent to the plan  
 17 effective date. However, Compass is not buying the Colt Gateway loan, and the underlying  
 18 motion here does not effect Debtors' ability to close the Compass sale.

19 Even if the plan effective date were relevant to this motion, Debtors have never even  
 20 determined (or at least disclosed) the plan effective date. Debtors acknowledge that the plan  
 21 cannot become effective until they close the Compass sale, and they represent that they will close  
 22 on February 14, 2007, two days from now (Opposition at 3, ¶7). Yet the only evidence on the  
 23 record indicates debtors cannot close the sale for reasons completely unrelated to the loan in  
 24 question here. To close, Compass must be licensed as a loan-servicing agent. However, the State  
 25 of Nevada has indicated that it is not going to license Compass. Ex. 1, D. Cangelosi decl. &  
 26 supporting email, originally filed as Ct. Dkt #37 in *Lenders Protection Group v. USA Commercial*

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27  
 28 1 The Diversified Committee's joinder does not contain any additional arguments, so movants file a single reply.

1 *Mortgage Co.*, Case No. 07-0072 (D. Nev. filed Feb. 9, 2007). If Compass is not licensed, there is  
2 no way to know when the plan will go effective.

3 Debtors also suggest that Tabas and Fertitta delayed in bringing this motion. Movants  
4 wholeheartedly disagree. The Jones Vargas Direct Lenders brought a motion for stay relief at the  
5 start of this case, seeking permission to change servicing agents if a majority of lenders on any of  
6 their loans wanted to change the servicing agent. The Court denied the motion. Another direct  
7 lender, Scott Canepa, assembled a majority of the lenders in another loan and moved for relief to  
8 exercise his contractual and legal rights to change the servicing agent. The Court denied the  
9 motion. As a result of the Court's prior rulings, Tabas and Fertitta decided it would be prudent to  
10 wait until the plan was confirmed, giving debtors ample opportunity to address issues that  
11 undercut a change of servicing agent earlier in the case. Movants were dilatory and should be able  
12 to select a servicing agent of their choice.

13 Now, with uncertainty debtors' plan effective date, Tabas and Fertitta are entitled to  
14 replace USA Commercial as the servicing agent. Tabas and Fertitta cannot accept debtor's  
15 indifference to the default on the Colt Gateway loan. They are entitled by contract and state law  
16 to replace the servicing agent, and request relief from the automatic stay to do so.

17 **B. Cause exists to grant movants' requested relief from the automatic stay.**

18 Debtors' assert there is no evidence or law to support relief from the automatic stay, but  
19 they ignore the contents of the motion. The motion contained a copy of the disciplinary report  
20 from the Nevada Division of Mortgage Lending (Ct. Dkt. #2457, Ex. L), and Debtors admit that  
21 USA Commercial has allowed the loan to remain in default throughout the bankruptcy without  
22 taking any action to foreclose under the Tabas/Diversified loan-servicing agreements and Nevada  
23 state law (Opposition at 3, ¶8). Debtors assert that Mr. Allison has "worked diligently and in good  
24 faith to fulfill USACM's duties," yet neither Debtors nor Mr. Allison provide any evidence of his  
25 efforts. Indeed, Tabas and Fertitta notified Mr. Allison months ago of their desire to foreclose this  
26 loan. The loan remains in default today, despite Mr. Allison's repeated assurances that he would  
27 reach a deal with the borrower. Indeed, Debtors acknowledge that Mr. Allison relied upon the  
28 interest of unrelated parties--people who were not invested in the Colt Gateway loan--in deciding

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that it was not in Tabas and Fertitta's best interest to foreclose the loan. *Id.* Debtors combined pre- and post-petition conduct, along with an admitted lack of adequate security (Opposition at 3, ¶9), are sufficient cause to terminate the automatic stay. *See In re Colrud*, 45 B.R. 169, 178 n. 12 (Bankr. D. Alaska 1984) (debtor's breaches may constitute cause for stay relief); *accord In re Zeoli*, 249 B.R. 61, 63-64 (Bankr. S.D.N.Y. 2000) (ongoing breaches constitute cause); *In re Palace Quality Servs. Indus., Inc.*, 283 B.R. 868, 906 n.40 (Bankr. E.D. Mich. 2002) (post-petition lease rejection constitutes cause).

That said, Tabas and Fertitta prefer to have the borrower immediately pay off the loan. Positively, debtors have represented that they can get the loan paid off. On February 7, 2007, during a teleconference with Fertitta's chief financial officer, William J. Bullard, and counsel for the parties, Mr. Allison stated he had reached an agreement with the borrower to pay the direct lenders in full. Chubb decl., filed concurrently with this motion. Mr. Allison agreed to provide the written terms of the agreement as well as a payoff letter. *Id.* To date, the movants have not received anything written from Mr. Allison or debtors. *Id.* Debtors inability to provide any documents is particularly vexing, because the borrower's counsel has represented to the movants that the borrower is ready and willing to pay off the loan. *Id.*

This is a case where the lenders want the loan paid off, and the borrower wants to pay off the loan. Debtor has had more than ten months to make this deal work, but today--days before the purported plan effective date--debtors are unable to provide the figures and documents to pay off this loan. Given the continued uncertainty surrounding this loan, Tabas and Fertitta are compelled to seek stay relief to hire their own servicing agent.

**C. Movants did not omit pertinent facts in their request.**

Movants concurrently filed a motion for an ordering shortening time (Ct. Dkt. #2460, filed Jan. 17, 2007, attached as Ex. 2). The Official Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC, opposed the motion (Ct. Dkt. #2479, filed Jan. 18, 2007, attached as Ex. 3). The Diversified Committee disputed movants' claim that USA Commercial Mortgage would continue to service the loan, stating: "That assumption is entirely incorrect as the loan servicing rights to the Colt Gateway loan are transferred under the Plan of

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1 Reorganization to the post-Effective Date USA Capital Diversified Trust Deed Fund, LLC . . . .  
 2 Movants are well aware of the fact that the Diversified Fund will become the loan servicer after  
 3 the Effective Date of the Plan of Reorganization as many discussions about that fact have  
 4 occurred, however, Movants chose not to inform the Court of this material fact." *Id.* at 2. The  
 5 Court denied the motion for an order shortening time, stating: "When the matter is heard, moving  
 6 counsel shall be prepared to explain why they failed to omit pertinent facts in their request" (Ct.  
 7 Dkt. #2504, filed Jan. 19, 2007, attached as Ex. 4).

8 Despite the representations by Diversified Committee (and by debtors in their opposition  
 9 to the motion for stay relief), the Colt Gateway servicing rights are not "transferred under the Plan  
 10 of Reorganization to the post-Effective Date USA Capital Diversified Trust Deed Fund, LLC."  
 11 Movants requested that the Diversified Committee identify the basis for their statement, and the  
 12 committee pointed to Plan Section IV.D.2 concerning the post-effective-date form of Diversified  
 13 Trust Deed Fund. Ex. 5, 1/20/07 Hermann-Chubb email. After careful and repeated readings of  
 14 the cited section, movants' counsel believes the Diversified Committee is referring to a portion of  
 15 one sentence and a parenthetical as the basis for its "rights" in the loan-servicing agreement: "The  
 16 assets of the DTDF Estate retained by the Post-Effective Date include the DTDF loans (including  
 17 but not limited to the rights associated with the former Epic and Sheraton Loans and the Loan  
 18 Servicing Agreements for the Excluded DTDF loans)." Ex. 6, Plan at 50 (emphasis added).

19 The plan misrepresents the true facts by stating that Diversified "retains" the loan-servicing  
 20 rights. Diversified did not own the loan servicing rights prior to the plan. USA Commercial  
 21 undisputedly held the loan-servicing rights when it filed for bankruptcy, and this Court has never  
 22 approved a transfer of those rights to Diversified. It is impossible for Diversified to "retain" the  
 23 servicing rights since it never had them.

24 Furthermore, the plan did not give effective notice of any purported transfer of USA  
 25 Commercial's servicing rights to Diversified. The cited language is under a section discussing the  
 26 post-plan form of Diversified. However, Fertitta and Tabas never had any relationship with  
 27 Diversified, other than be co-direct lenders in the Colt Gateway loan. Fertitta's and Tabas's only  
 28

1 relationship was with USA Commercial, and there is no discussion of this purported "transfer" of  
 2 servicing rights in any plan section concerning USA Commercial.

3 Finally, neither debtors or the Diversified Committee engaged in any conversations with  
 4 movants or their counsel about the fact that USA Commercial was "transferring" its servicing  
 5 rights "to" Diversified. Chubb decl., filed concurrently with this motion. Moreover, Movants  
 6 were not alone in their understanding to the contrary. The Unsecured Creditors Committee also  
 7 interpreted the plan such that USA Commercial's loan-servicing rights went to the USA  
 8 Commercial Liquidating Trust, not Diversified. Ex. 7, 1/20/07 Charles-Chubb email. Even the  
 9 Unsecured Creditors Committee's counsel "did not appreciate" the argument that Diversified  
 10 "retained" the servicing rights until after it was explained to him by the Diversified Committee's  
 11 counsel. *Id.*

12 Tabas and Fertitta absolutely did not omit any pertinent facts from their motion. The  
 13 position taken by debtors and Diversified is a unilateral interpretation of a provision buried in a  
 14 section unrelated to servicing rights, misstating the rights to the servicing rights. If the plan is, in  
 15 fact, read to transfer the servicing rights from USA Commercial to Diversified, then USA  
 16 Commercial has transferred its assets without clear notice to anyone except for Diversified.

### 17 CONCLUSION

18 Tabas and Fertitta have contractual and legal rights to replace USA Commercial as the  
 19 loan-servicing agent on the Colt Gateway loan. USA Commercial violated numerous contractual  
 20 and legal provisions in servicing this loan, and it has completely abandoned its duty to the direct  
 21 lenders in allowing this loan to remain in default. The plan effective date also remains uncertain,  
 22 and Tabas and Fertitta no longer want USA Commercial to service this loan. Therefore, the Court  
 23 should grant the motion for stay relief in order for Tabas and Fertitta to select a new servicing  
 24 agent.

25 DATED this 12th day of February, 2007.

26 JONES VARGAS

27 //s//Louis M. Bubala III  
 28 LOUIS M. BUBALA III, ESQUIRE  
 Counsel for Fertitta Enterprises, Inc.,  
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**CERTIFICATE OF SERVICE**

1. On February 12, 2007, I served the following document(s):

**REPLY OF ESTATE OF DANIEL TABAS AND FERTITTA ENTERPRISES, INC., TO  
DEBTOR'S OPPOSITION TO MOTION FOR RELIEF FROM THE AUTOMATIC  
STAY TO TERMINATE THE LOAN SERVICING AGREEMENT  
FOR THE DIRECT LOAN TO COLT GATEWAY LLC**

2. I served the above-named document(s) by the following means to the persons as listed below:

■ a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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■ b. **United States mail, postage fully prepaid** (list persons and addresses):

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4484 SOUTH PECOS ROAD  
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9 c. **Personal Service** (list persons and addresses):  
I personally delivered the document(s) to the persons at these addresses:

9 For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

9 For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

■ d. **By direct email (as opposed to through the ECF System)** (list persons and email addresses):

**Frank Merola, Eve Karasik & Christine M. Pajak**  
fmerola@stutman.com; ekarasik@stutman.com; cpajak@stutman.com

**Marc A. Levinson & Lynn Trinko Ernce**  
malevinson@orick.com; lernce@orrick.com

**Andrew Welcher c/o William E. Winfield,**  
wwinfield@nchc.com

**Steven C. Strong, & Douglas M. Monson**  
sstrong@rqn.com; dmonson@rqn.com

**Leonard E. Schwartzer**  
Lschwartz@sm-law.com

**Susan M. Freeman**  
sfreeman@lrlaw.com

**August B. Landis**  
Augie.landis@usdoj.gov

**Nevada Mortgage Lending Division**  
**Attn: Susan Eckhardt**  
seckhardt@mld.nv.gov

Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

9 e. **By fax transmission** (list persons and fax numbers):

Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

9 f. **By messenger:**

I served the document(s) by placing them in an envelope or package addressed to the persons at the addresses listed blow and providing them to a messenger for service. (A declaration by the messenger must be attached to this Certificate of Service).

**I declare under penalty of perjury that the foregoing is true and correct.**

DATED this 12<sup>th</sup> day of February, 2007.

C. Grinstead _____ Name	//s// C. Grinstead _____ Signature
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JONES VARGAS  
 100 W. Liberty Street, 12<sup>th</sup> Floor  
 P.O. Box 281  
 Reno, Nevada 89504-0281  
 Tel: (775) 786-5000 Fax: (775) 786-1177